

United States of America, ) No. CV 12-076-PHX-GMS (MEA)  
 )  
Plaintiff, ) No. CR 11-50112-PHX-GMS  
 )  
v. ) **ORDER**  
 )  
Norberto Leyva-Cortez, )  
 )  
Defendant/Movant. )

## I. Procedural History

Pursuant to a plea agreement in Movant's corresponding criminal case, CR 11-1498-PHX-GMS, Movant pled guilty to Re-Entry of Removed Alien, in violation of 8 U.S.C. § 1326(a) with a sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(1). As part of that agreement, Movant agreed to admit to the Grade B violation in the Petition to Revoke Supervised Release in this case. On December 14, 2011, the Court revoked Movant's supervised release and sentenced Movant to a 9-month term of imprisonment to be served consecutively to Movant's sentence in CR 11-1498-PHX-GMS.

1 Movant seeks a reduction of his sentence because he believes he received “a lot of  
2 time just for Re-entry” and because his prior conviction should not be used to enhance his  
3 sentence.

## 4 **II. Summary Dismissal**

5 A district court must summarily dismiss a § 2255 application “[i]f it plainly appears  
6 from the motion, any attached exhibits, and the record of prior proceedings that the moving  
7 party is not entitled to relief.” Rule 4(b), Rules Governing Section 2255 Proceedings for the  
8 United States District Courts. When this standard is satisfied, neither a hearing nor a  
9 response from the government is required. See Marrow v. United States, 772 F.2d 525, 526  
10 (9th Cir. 1985); Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1982).

11 In this case, the record shows that summary dismissal under Rule 4(b) is warranted  
12 because Movant has waived the right to bring a § 2255 motion.

## 13 **III. Waiver**

14 Movant has waived challenges to his sentence. The Ninth Circuit Court of Appeals  
15 has found that there are “strict standards for waiver of constitutional rights.” United States  
16 v. Gonzalez-Flores, 418 F.3d 1093, 1102 (9th Cir. 2005). It is impermissible to presume  
17 waiver from a silent record, and the Court must indulge every reasonable presumption  
18 against waiver of fundamental constitutional rights. United States v. Hamilton, 391 F.3d  
19 1066, 1071 (9th Cir. 2004). In this action, Movant’s waiver was clear, express, and  
20 unequivocal.

21 Plea agreements are contractual in nature, and their plain language will generally be  
22 enforced if the agreement is clear and unambiguous on its face. United States v. Jeronimo,  
23 398 F.3d 1149, 1153 (9th Cir. 2005). A defendant may waive the statutory right to bring a  
24 § 2255 action challenging the length of his sentence. United States v. Pruitt, 32 F.3d 431,  
25 433 (9th Cir. 1994); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1992). The only  
26 claims that cannot be waived are claims that the waiver itself was involuntary or that  
27 ineffective assistance of counsel rendered the waiver involuntary. See Washington v.  
28 Lampert, 422 F.3d 864, 871 (9th Cir. 2005) (holding that a plea agreement that waives the

1 right to file a federal habeas petition pursuant to § 2254 is unenforceable with respect to an  
2 ineffective assistance of counsel claim that challenges the voluntariness of the waiver); Pruitt,  
3 32 F.3d at 433 (expressing doubt that a plea agreement could waive a claim that counsel  
4 erroneously induced a defendant to plead guilty or accept a particular plea bargain); Abarca,  
5 985 F.2d at 1014 (expressly declining to hold that a waiver forecloses a claim of ineffective  
6 assistance or involuntariness of the waiver); see also Jeronimo, 398 F.3d at 1156 n.4  
7 (declining to decide whether waiver of all statutory rights included claims implicating the  
8 voluntariness of the waiver).

9 “Collateral attacks based on ineffective assistance of counsel claims that are  
10 characterized as falling outside [the category of ineffective assistance of counsel claims  
11 challenging the validity of the plea or the waiver] are waivable.” United States v.  
12 Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2001). See also Williams v. United States, 396  
13 F.3d 1340, 1342 (11th Cir. 2005) (joining the Second, Fifth, Sixth, Seventh, and Tenth  
14 Circuits in holding that “a valid sentence-appeal waiver, entered into voluntarily and  
15 knowingly, pursuant to a plea agreement, precludes the defendant from attempting to attack,  
16 in a collateral proceeding, the sentence through a claim of ineffective assistance of counsel  
17 during sentencing.”).

18 As part of his plea agreement, Movant made the following waiver:

19 Providing the defendant’s sentence and disposition are  
20 consistent with this agreement, the defendant waives: (1) any  
21 and all motions, defenses, probable cause determinations, and  
22 objections which the defendant could assert to the information  
23 or indictment, or to the petition to revoke; and (2) any right to  
24 file an appeal, any collateral attack, and any other writ or motion  
25 that challenges the conviction, an order of restitution or  
26 forfeiture, the Court’s entry of judgment against defendant, or  
27 any aspect of the defendant’s sentence or disposition, including  
28 the manner in which the sentence or disposition is determined,  
including but not limited to any appeals under 18 U.S.C. § 3742  
and motions under 28 U.S.C. §§ 2241 and 2255. **The  
defendant acknowledges that if the court has sentenced the  
defendant and imposed disposition according to the terms of  
the agreement, this waiver shall result in the dismissal of any  
appeal, collateral attack or other motion the defendant  
might file challenging the conviction . . . .**

1 (Doc. 22 in CR 11-1498-PHX-GMS) (emphasis added). Movant indicated in his plea  
2 agreement that he had discussed the terms with his attorney, agreed to the terms and  
3 conditions, and entered into the plea voluntarily. (Doc. 22).

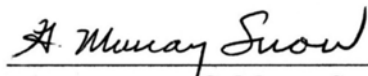
4 Movant's assertions in his § 2255 motion all pertain to sentencing and do not pertain  
5 to the voluntariness of the waiver. Movant expressly waived issues regarding the imposition  
6 of sentence and expressly waived the right to bring a § 2255 motion. The Court accepted his  
7 plea as voluntarily made. Consequently, the Court finds that Movant waived the sentencing  
8 issues raised in his § 2255 motion. Thus, the Court will summarily dismiss the motion.  
9 Accordingly,

10 **IT IS ORDERED:**

11 (1) The Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C.  
12 § 2255 (Doc. 20 in CR 11-50112-PHX-GMS) is **denied** and the civil action opened in  
13 connection with this Motion (CV 12-076-PHX-GMS (MEA)) is **dismissed with prejudice**.  
14 The Clerk of Court must enter judgment accordingly.

15 (2) Pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, in the event  
16 Movant files an appeal, the Court declines to issue a certificate of appealability because  
17 reasonable jurists would not find the Court's procedural ruling debatable. See Slack v.  
18 McDaniel, 529 U.S. 473, 484 (2000).

19 DATED this 16th day of February, 2012.

20  
21   
22 \_\_\_\_\_  
G. Murray Snow  
United States District Judge